Supreme Court, U. S.
FILED
NOV 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-769

UNITED STEELWORKERS JUSTICE COMMITTEE, *Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

And

ALLEGHENY-LUDLUM INDUSTRIES, *et al.*, *Respondents*

Petition for a Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

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No.

United Steelworkers Justice Committee, *Petitioner*
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United States of America, *et al.*
And
Allegheny-Ludlum Industries *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, United Steelworkers Justice Committee, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of intervention to the United Steelworkers Justice Committee in the Consent Decree entered into between the United States of America, the United Steelworkers of America, and the Steel Companies. The judgment of the Court of Appeals was entered on June 6, 1977, and the Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 26, 1977.

OPINIONS BELOW

The Judgment Order of the Court of Appeals (Appendix B herein) is reported at 553 F.2d 451 (5th Cir. 1977). The Court of Appeals' Order Denying Rehearing En Banc (Appendix C herein) is not officially reported. The Opinion of the District Court for the Northern District of Alabama (Appendix A herein) is not officially reported.

JURISDICTION

The Order of the Court of Appeals was entered on June 6, 1977, and a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 26, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it affirmed the denial of intervention by the District Court on the grounds that the applicants for intervention knew of the Consent Decree three days after it was filed notwithstanding the total absence of any factual basis in the record to support such finding, and in direct contradiction to the finding of the District Court that timeliness was NOT an issue?

2. Did the Court of Appeals err in affirming the denial of intervention by the District Court, on the ground that the court had taken procedural precautions to protect the rights asserted by petitioners when no party to the consent decrees represented the rights of petitioners without conflict of interest and when the rights asserted by petitioners were not vindicated by this Court until May 31, 1977 in *International Brotherhood of Teamsters v. United States*?

STATUTES AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

42 U.S.C. §2000e-2(h)

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national

origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.
Pub.L. 88-352, Title VII, §703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

42 U.S.C. §2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back

pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.
Pub.L. 88-352, Title VII, §706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, §4, Mar. 24, 1972, 86 Stat. 104.

RULE 24.
INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Nature of the Proceedings Below

On April 12, 1974, the Secretary of Labor and the Equal Employment Opportunity Commission ("EEOC"), filed a Complaint in the District Court for the Northern District of Alabama against nine steel companies and the United Steelworkers of America, AFL-CIO ("Union"). The Complaint alleged a pattern or practice of race and sex discrimination in employment by the Companies and the Union in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* and of Executive Order 11246, as amended, 3 C.F.R. 169 *et seq.* (1974) (1a).[1] Contemporaneously therewith, the parties entered into a settlement agreement expressed in two written Consent Decrees ("Decree I and Decree II") (10a; 64a). In addition, the Government parties and Companies entered into a Memorandum of Agreement relating to affirmative action in hiring (72a). On that same day, the district court signed and entered the decrees (60a; 68a).

By the terms of decrees entered on April 12, 1974, the broad principles contained therein were to be operational no later than January 1, 1975 (16a; 22a). On December 27, 1974, Consent Decree I was amended to extend the compliance deadline for certain portions of the decree from January 1, 1975, to and including March 15, 1975, or an appropriate date as determined by the Audit and Review Committees (120a-121a).

On January 29, 1975, Petitioner, United Steelworkers Justice Committee (hereinafter "Committee") on behalf of itself and on behalf of fifty named black and white steelworkers, pursuant to Federal Rules of Civil Procedure

1. The references in parentheses in the Petition, unless otherwise noted, are to the Appendix filed in the Court of Appeals for the Fifth Circuit by Petitioner.

24(a) (1) and 24(a) (2) sought leave of the district court to intervene as parties defendant and to file a counterclaim for declaratory and injunctive relief (122a; 135a; 154a).

Petitioner and the individual steelworkers thereby represented, sought modifications of Consent Decree I insofar as it illegally deprived them of certain seniority benefits which they had previously enjoyed, and also monetary damages by virtue of the reverse discrimination contained in the decree (151a-153a).

Under Rule 24(a) (1), Petitioner and the named applicants for intervention claim an unconditional right to intervene in those counts of the complaint brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. Under Rule 24(a) (2), Petitioner and named applicants claim the right to intervene on the basis of their interest in the subject matter of the litigation which interest has not been adequately represented by the parties. By virtue of the pendency of an appeal to the Fifth Circuit by other challengers to the consent decrees[2], prior to the filing of Petitioner's Motion, the district court declined jurisdiction of the Motion to Intervene until the disposition of that appeal by the Court of Appeals (390a-392a). On August 18, 1975, the Fifth Circuit affirmed the Order of the district court in *Allegheny-Ludlum Industries, Inc., et al.* (hereinafter *Allegheny-Ludlum I*).

Thereafter, Petitioner's Motion for Leave to Intervene was entertained by the district court after briefing by all parties and oral argument on March 18, 1976 (448a). No testimony was received despite the request of Petitioner (452a). On March 22, 1976, the district court entered an Order (Appendix A) (429a) in which it broadly denied

2. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In that case, challenges were brought to vacate the decrees because they did not go far enough and failed to provide adequate back pay and job opportunities for women and minorities.

Petitioner and the applicants for intervention leave to intervene either under Rules 24(a) (1), (2) or as a matter of discretion, under Rule 24(b) on the grounds that the Motion was untimely filed. The court incorporated as part of its Opinion the Memorandum in Opposition to the Committee's intervention filed by Plaintiffs (429a; 430a).

On April 22, 1976, Petitioner appealed to the United States Court of Appeals for the Fifth Circuit (447a). On June 6, 1977, the Fifth Circuit affirmed the order of the district court, 553 F.2d 451 (Appendix B) and on August 26, 1977, denied a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* (Appendix C).

B. Statement of Facts

The Consent Decree herein was negotiated by the parties and submitted for approval of the district court on April 12, 1974, which approval was granted simultaneously. The order entered in the Northern District of Alabama was announced on the same day that the Basic Steel agreement for the entire steel industry was consummated in Washington, D.C. By its very terms, the Consent Decree required that certain aspects of the decree be applicable no later than 90 days following the conclusion of said negotiations, but that provisions relative to:

> (1) plant continuous service, (2) transfer rights, (3) rate retention, (4) goals, and (5) back pay, as well as all appropriate specific provisions of this Decree, shall also be made applicable to all employees for whom the Union is the collective bargaining representative at the plants and facilities set forth below in paragraph 3(a) as soon as practicable, but in no event later than January 1, 1975 . . . (16a).

Thus, the specific effect of the decree was in large measure deferred at least until August 12, 1974, and in the compli-

cated area of job realignment, until January 1, 1975. Indeed, on December 27, 1974, the district court *extended the deadline for implementation of the decree in paragraph 3(d), supra, at least to March 15, 1975*, since not all plants and facilities could meet the earlier deadline. (120a-121a).

On January 29, 1975, less than 30 days after the Decree was originally scheduled to be fully effective and well before the extended deadline, petitioner filed a Motion for Leave to Intervene as parties defendants to modify Decree I insofar as it abridged seniority, promotion, transfer and other rights in violation of the Civil Rights Act of 1964, as amended (122a). Because of the pendency of an appeal to the Fifth Circuit from the district court's order denying intervention to the parties in *Allegheny-Ludlum I*, the Court found it lacked jurisdiction to consider petitioner's intervention on June 26, 1975 (348a; 390a). *Allegheny-Ludlum I*, which was commenced on April 16, 1974, involved challenges[3] to the Consent Decree which, in the words of the district court:

> . . . attack the Consent Decree on various grounds of illegality, including vagueness; venue deprival; lack of advance notice, enforcement by violators; insufficiency of relief; direct interference with rights of individuals to file, maintain or pursue individual remedies; and a renunciation of statutory responsibility by executive agencies (85a).

On June 7, 1974, the court denied intervention in part, granted it in part and denied the intervenors' requested

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3. Challengers represented persons whose interests were represented both by the Attorney General and the EEOC, but who were dissatisfied with the extent of relief provided by the consent decrees.

relief (90a). On July 3, 1974, intervenors in *Allegheny-Ludlum I* appealed to the Court of Appeals, thereby depriving the district court of jurisdiction to determine petitioner's Motion for Leave to Intervene. Thus, one month before the Consent Decree was in broad principle to become effective, Petitioner was without immediate and effective recourse to the court by virtue of the *Allegheny-Ludlum I* appeal. Moreover, by the date of that appeal, rank and file steelworkers were still unaware of the terms of the consent decree except as a single sentence in their printed collective bargaining agreements.

The first concrete awareness of the decree did not commence until August, 1974, when revision and realignment of seniority rosters started. The seniority changes were frequent and included merger of seniority lines from many departments, even of whole plants. Grievances to Implementation Committees or to the Audit and Review Committee were ignored or rejected and the court continued to modify the terms of the decree from August, 1974, through December, 1974 (111a, 120a).

Indeed, when the district court first considered Petitioner's Motion to Intervene on June 26, 1975, it stated:

> *I doubt that delays in filing the application for intervention subsequent of the taking of appeal to the Fifth Circuit could have created any prejudice to the existing parties. There was some delay, but I doubt that it could possibly be of any prejudice to the parties in the peculiar facts of this case* (389a). (Emphasis supplied.)

In the face of this finding and despite the absence of any evidence in the record to the contrary, the district court denied the petitioner's Motion on the grounds of untimeliness, which was affirmed by the Court of Appeals. The district court said:

> . . . the court is of the opinion that the motion to intervene was not timely filed, being filed approximately nine months after entry of the consent decree and *being filed in excess of four months after the consent decree provisions in part began to be effective* (A2). (Emphasis supplied.)

In affirming the court's order, the Court of Appeals said:

> The applicants offered no compelling reasons for waiting until seven and a half months after the judgment and *six months after implementation of the decrees* to file their Motion. Intervention now for the purpose of challenging the consent agreement will prejudice the appellees by jeopardizing months of negotiations, causing substantial litigation expenses, and even more substantial expenses of implementation. *The applicants knew of the consent agreement three days after the suit was filed;* numerous *other individuals* and groups *moved to intervene before* the district *court entered a judgment on the decrees.* To allow the applicants to intervene now would disrupt carefully considered proceedings (A9). (Emphasis supplied.)

There is no record evidence to support these findings; indeed intervenors in *Allegheny-Ludlum I* filed their motions *after* the entry of the decrees by the court. (Docket Entries, Appendix).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals denying intervention on the grounds of untimeliness is in conflict with the principles laid down by this Court in United Airlines, Inc., v. McDonald, 431 U.S. —, 97 S.Ct. 2464 (1977).

On June 20, 1977, this Court ruled that a motion to intervene for purposes of appeal is timely under F.R.C.P. 24(b) if filed within the 30-day period for an appeal to be taken. *United Airlines, Inc., v. McDonald,* 431 U.S. —, 97 S.Ct. 2464 (1977). In upholding the post-judgment intervention, this Court said:

> The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment. *Id.* at 2470-71.

In *McDonald,* intervenors had sought to represent a class which the district court refused to certify. Despite a lengthy trial and full awareness of the proceedings, intervenors did not seek to intervene to appeal the adverse class determination until 18 days following final judgment, some five years after the commencement of the litigation, and three years after the denial of class action status. *Id.* at 2471, n.1 (dissenting opinion).

Notwithstanding those facts, this Court stated in affirming the timeliness of the motion to intervene:

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests. *Id.* at 2470.

An analysis of the record herein discloses that Petitioner had no knowledge of the negotiations leading to the entry of the Consent Decree on April 12, 1974. Further,

as both the district court and Court of Appeals concede, the decree was not implemented immediately. The Petitioner moved to intervene as swiftly as the effects of the work of the Implementation Committees under the Consent Decree became known and prior to the final deadline for implementation of the decree. The decree, when entered on April 12, 1974, outlined broad principles, but left to the individual plant Committees the task of fleshing out the specifics. Thus, the realignment of jobs, lines of progression, seniority rosters, etc., were not part of the decree. They emerged and continued to emerge through the fall of 1974 and after Petitioner's Motion to Intervene was filed.

During this period, Petitioner sought review through the grievance procedure of the collective bargaining agreement and the Implementation and Audit and Review Committees provided for in the decree. The grievances were uniformly rejected as "decree-related." Moreover, any attempt to institute litigation in any other forum was futile, since the decree provides at paragraph C:

> . . . If a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systemic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court or other forum in which such private action or proceeding is brought that such relief in that action or proceeding is unwarranted (13a).

Under all of those circumstances, the sole recourse for Petitioner to vindicate the rights it asserted was to intervene "post-judgment" in the decree. As a practical matter, intervention after July 7, 1974, would have been a useless gesture since *Allegheny-Ludlum I* was already on appeal to the Fifth Circuit.

While the Court of Appeals suggests that intervenors in *Allegheny-Ludlum I* had knowledge of the decree and hence Petitioner herein must be equally charged with notice, an examination of the parties in *Allegheny-Ludlum I* will quickly dispel that inference. Intervenors there consisted largely of plaintiffs in existing employment discrimination lawsuits against the defendants who challenged the decree as inadequate or adverse to their pending litigation.[4] Petitioner and the applicants represented by it were in no way privy to or involved in pending litigation. No party to the negotiations represented their interests without conflict of interest and did not notify Petitioner or applicants of the details or potential effects of the decree. Nor had there been a trial which resulted in a finding of non-bona fides of the seniority system under which applicants had been working. Thus, a motion to intervene by Petitioner could not have been filed sooner than August, 1974, by which time the court had been temporarily deprived of jurisdiction. *Accord, United Airlines, Inc. v. McDonald*, 97 S.Ct. 2470, n. 15.

Under the peculiar circumstances of this case, the judgment of the Court of Appeals that the Motion to Intervene was untimely is erroneous, particularly, where as here, Petitioner sought leave to intervene as a matter of right under F.R.C.P. 24(a) (1) and (2). In *McDonald*, permissive intervention was sought under F.R.C.P. 24(b), which requires much closer scrutiny than does intervention of right. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. 1970); *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970).

Under the principles enunciated by this Court in *McDonald, supra*, Petitioner's Motion to Intervene was timely,

4. As has been pointed out *supra*, their interests were clearly represented by the Attorney General and the EEOC. As will be shown *infra*, no party to the consent decree represented the interests of Petitioner or applicants without conflict.

coming as it did one and a half months prior to the deadline for implementation of the Decree and within 30 days of the original deadline set by the court. There was no evidence offered in the district court to show prejudice to the parties by the Petitioner's filing on January 29, 1975. The offer by Petitioner to produce testimony in support of the Motion was denied. Thus, there is no evidence to support the findings of the Court of Appeals. Moreover, under the facts of this case and the applicable principles under *McDonald*, the conclusion of law of untimeliness was plain error.

2. The decision of the Court of Appeals denying intervention on the ground of untimeliness is in conflict with the decisions of other Courts of Appeals.

In *EEOC v. AT&T*, 506 F.2d 735 (3d Cir. 1974), the United States Court of Appeals for the Third Circuit found, in agreement with the district court there, that the Union had a right to intervene pursuant to Rule 24(a) (2) to protect its interests. In that instance, CWA had been involved in and aware of over two years of litigation before the FCC involving AT&T's discriminatory employment practices. Nevertheless, although invited to participate, CWA declined to negotiate along with the Government. However, the Complaint, Memorandum Agreement and Consent Decree in that case, which were entered contemporaneously on the same afternoon in January, 1973, did not foreclose CWA's right to intervene twenty-two days later. 365 F. Supp. 1105, 1114-17, 1130 (E. D. Pa. 1973); 506 F.2d 735 (3d Cir. 1974).

Unlike the Union in the *AT&T* case, Petitioner and the applicants for intervention herein were not participants or even privy to the negotiations leading up to the Consent Decree. Despite the fact that the United Steelworkers of America had prompted the negotiations leading to the Consent Decree, the rank and file membership was un-

aware of its pendency until it was announced on April 12, 1974.

Timeliness is a flexible concept that should not be used to deprive an intervenor who has a right in the proceedings of his day in court. In *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), leave to intervene under Rule 24(a)(2) was granted in a trusteeship proceeding under Title III of the LMRDA by the United States Court of Appeals for the District of Columbia, notwithstanding the fact that seven years had elapsed from the commencement of the action. Applicants there, as here, sought to participate only in the remedial and appellate phases of the proceedings. No attempt was made to relitigate issues or open the scope of the proceedings to other causes of action.

In that connection, it is important to realize that *in the instant case, Petitioner seeks only to participate in fashioning the remedy to the discriminatory employment practices*. As the same court stated in *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 777:

> Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. *Id.* at 508, cited approvingly in *Hodgson, supra*, at 128-130.

This Court cited both *Hodgson, supra*, and *Wolpe, supra*, approvingly in *McDonald, supra*, for additional authority to validate post-judgment intervention in appropriate cases. *United Airlines, Inc., v. McDonald*, 97 S.Ct. 2470-71, n. 16. As in *Hodgson*, Petitioner seeks to shape the remedy in this case since it directly affects and adversely so, major portions of the collective bargaining provisions involving job security and benefits upon which applicants relied and planned their careers.

In *Rios v. Steamfitters, Local 638*, 520 F.2d 352 (2d Cir. 1975), the Court of Appeals for the Second Circuit

rejected the lower court's determination that ten months after the entry of order and judgment was too late to file a Motion for Leave to Intervene.[5] For other substantative reasons, the court denied intervention therein.

3. The decision of the Court of Appeals involves an important question of federal law which has not been, but should be decided by this Court.

In affirming the order of the district court, the Court of Appeals stated:

> We reject the steelworkers' appeal principally on the basis of the decision of the district court and its careful procedural attempts not to prejudice any rights asserted by applicants for intervention (A8).

However, the district court specifically found that Petitioner lacked any right to intervene under F.R.C.P. 24(a)(1) and (2) and stated:

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5. See also, Sagers v. Yellow Freight System, 68 F.R.D. 686 (N.D. Ga. 1975). While the legal issue involved affects class action suits under Rules 23(b) and (e) of the Federal Rules of Civil Procedure, the underlying rationale is directly on point. The court quoted approvingly from Wright & A. Miller, Federal Practice and Procedure, §1797 at 226 (1972).

> There is no dispute that the terms of the Rule [R. 23(e)] are mandatory, designed in part "to protect the nonparty members of the class from unjust or unfair settlements affecting their rights when the representatives become faint hearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise."

In that case, the court decided that it was at least error, if not unconstitutionally invalid, to have approved the consent decree without notice to the nonparty members of the affected class. Thus, the court indicated its intention to vacate the consent decree even though approved one year earlier on appeal to the Fifth Circuit.

> ...neither the committee nor the individual applicants are so situated that the disposition of this action may as a practical matter impair or impede their respective abilities to protect the interest claimed by them which is the subject of this action (A1).

Until May 31, 1977, when this Court decided *International Brotherhood of Teamsters v. United States*, 431 U.S. —, 97 S.Ct. 1843 (1977); *United Airlines, Inc., v. Evans*, 431 U.S. —, 97 S.Ct. 1885 (1977); and June 16, 1977, when the opinion in *Trans World Airlines v. Hardison*, 431 U.S. —, 97 S.Ct. 2264 (1977) was rendered, applicants' putative rights to maintain their departmental seniority rights under a bona fide seniority system lacked this Court's protection. However, with this Court's decisions in *Teamsters* and *Evans, supra*, Petitioner and applicants were acknowledged to be protected against wholesale reorganization of departmental seniority systems in the absence of proof that the system was sexually or racially discriminatory in origin and hence was not bona fide within the meaning of 703(h) of the Civil Rights Act of 1964, as amended.

At issue in this case is whether the expectancies and rights of Petitioner and applicants under an otherwise bona fide seniority system can be compromised away by parties, none of whom represented Petitioner's interests without conflict and ambivalence, in the absence of proof of discriminatory intent in the genesis of the system. In the process, can said parties similarly grant preferential rights to non-victims of discrimination for promotions and transfers on the basis of race and/or sex at the expense of otherwise eligible beneficiaries qualified both by skill and departmental seniority? This Court said that: "Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." *Teamsters*, 97 S.Ct. at 1864.

The plain holding of this Court in *Teamsters* was to require the injunction against the departmental seniority

system to be vacated. If a court could not, after trial, order the dismantling of a bona fide seniority system, can a court sanction a negotiation away of those vested rights without any party representing the current incumbents? Petitioner suggests that such a procedure is contrary to the views of several Courts of Appeals which argue strongly in favor of Petitioner's right herein to intervene.

The Fifth Circuit ordered the inpleading of one or more white employees under Rule 19(a) or suffer dismissal of the complaint under Rule 41(b). *English v. Seaboard Coastline R.R. Co.*, 4 FEP 1125, 1128 (5th Cir. 1972).

In *English, supra*, the court clearly recognized the duality of interests as well as the antagonistic claims between discriminatees and other members of the union.

> *The district court felt that in the circumstances of this case the seniority rights of the absent white employees would be affected adversely if the requested relief was granted and that the union could not adequately and fairly represent the interests of both black and white members.* We view these conclusions as a finding under Rule 19(a)(2)(i) that disposition of the case without the absent white employees who have an interest in the action may as a "practical matter impair or impede" their ability to protect their interests. 4 FEP at 1127 (Emphasis supplied.)

Accord, Patterson v. Newspaper and Mail Deliverers' Union of N. Y., 514 F.2d 767 (2d Cir. 1975), in which the right to intervene pursuant to F.R.C.P. 24(a) (2) was given to one hundred non-minority employees because of their "potential interest in the relief to be fashioned." Moreover, applicants herein, unlike the applicants for intervention in *Rios v. Steamfitters, Local 638*, 520 F.2d 532 (2d Cir. 1975) are indeed claiming that they are "victims of reverse discrimination caused by the court's order." 520 F.2d at 356.

Thus, as has already been demonstrated, the Union in the present case was seeking both to comply with the Government's requirements as well as to avoid future litigation and costly damages. In the process, it was prepared to compromise and settle without fully representing or being compelled to represent the interests of applicants for intervention herein. It is clear, from the record in this case, that the compromise of their rights was achieved without notice to applicants for intervention both as nonparty members of the class affected by the Union's representation as well as by the failure of the Government plaintiffs to represent them as well.

In a somewhat analogous situation, a district court has determined that another union was an inappropriate representative for part of its membership in a class action under Title VII. For example, in *Communications Workers of America v. New York Tel. Co.*, 8 FEP 509 (S.D. N.Y. 1974), the court said:

> Telco [New York Telephone Company] asserts that a substantial conflict of interests exists between the union and all of the members of plaintiffs class. First, Telco argued that the disability plan was the result of collective bargaining agreement between CWA and Telco and is part of such agreement; thus, the union necessarily shares responsibility for any discrimination which may be found to derive from the disability plan. This contention is mirrored by Telco's counterclaim against the union plaintiff for contributions in the event that Telco is held liable for disability plan discrimination against female employees. Telco similarly argues that CWA, in collective bargaining negotiations concerning disability plans, has taken positions inconsistent with the positions which it takes in the present action. Finally, Telco asserts that since CWA represents both male and female employees of Telco, there is a serious potential conflict

> between the *duty of the unions to its male employee membership, and its duty to female employee members which relates not only to the merits of the claims of the discrimination, but also to the remedies if such claims are sustained.* 8 FEP at 512-513 (Emphasis supplied.)

Accordingly, the court concluded that CWA was not a proper representative of the class in that situation and found that since the union's interest was not co-extensive with the members of the class, CWA lacked standing to sue.

The language of Rule 24(a)(2) is couched in terms of practical prejudice, not merely theoretical prejudice. The significance of the language "as a practical matter" is further underscored since the phrase was first added to the Rule by a 1966 amendment, in lieu of the prior standard that the person "is or may be bound by a judgment in the action." Proposed Rules of Civil Procedure, 39 F.R.D. 69, 109. The amendment to the Rule liberalized the right to intervention so that a strict theory of *res judicata* would not be the test. See Advisory Committee's Note to Rule 24, 39 F.R.D. 109, 110; *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). Thus, whether the Petitioner's interests may be impaired is to be tested as a practical matter and not by strict notions of *res judicata*. Further, the intervention should be granted if the Petitioner's interests *may* be impaired; there is no burden on the applicant to show as a certainty that his interests *will* be impaired. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972); *Holmes v. Virgin Islands*, 61 F.R.D. 3 (D.C.V.I. 1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

ALLEGHENY-LUDLUM
INDUSTRIES, INC., *et al.*,
Defendants.

No. CA 74-P-339-S
Filed In Clerk's Office
Northern District of Alabama

March 22, 1976

James E. Vandegrift, Clerk
United States District Court
By:

ORDER

Pending before the court is the motion to intervene filed on behalf of the United Steelworkers Justice Committee and a number of individual applicants. Upon consideration thereof the court finds that neither the committee nor the individual applicants are so situated that the disposition of this action may as a practical matter impair or impede their respective abilities to protect the interest claimed by them which is the subject of this action. See *United States v. Allegheny-Ludlum Industries, Inc., et al.*, 517 F.2d 826 (CA5 1975), (noting in addition that intervention in such governmental actions is not encouraged). The court concludes that intervention should not be allowed as of right under Federal Rule of Civil Procedure 24(a)(1) or (2) or as a matter of discretion under Rule 24(b). The court considers that the memorandum filed by the plaintiffs in opposition to such intervention states in general the applicable principles of law and directs that such memorandum be filed as part of the official court record as further explanation of the reasons for denying

the intervention. In addition, the court is of the opinion that the motion to intervene was not timely filed, being filed approximately nine months after entry of the consent decree and being filed in excess of four months after the consent decree provisions in part began to be effective.

Accordingly, the motion to intervene is hereby DENIED.

This the 22nd day of March, 1976.

/s/
SAM C. POINTER, JR.
United States District Judge

APPENDIX B

UNITED STATES of America, by Griffin B. BELL, the Attorney General, on Behalf of F. Ray MARSHALL, the Secretary of Labor, and the Equal Employment Opportunity Commission, Plaintiffs-Appellees,

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., et al., Defendants-Appellees,

United Steelworkers Justice Committee et al., Movants-Appellants.

No. 76-2717.

United States Court of Appeals, Fifth Circuit.

June 6, 1977.

Following entry of consent decrees in an employment discrimination suit against an employer and union, a group of workers moved to intervene. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., denied their motion to intervene and workers appealed. The Court of Appeals held that where the motion was filed nine months after the union and the employers reached a consent agreement with the Equal Employment Opportunity Commission and seven and one-half months after the District Court issued a judgment on the legality of the consent agreement, the employees knew of the consent agreement three days after the suit was filed and numerous other individuals and groups moved to intervene before the district court entered its judgment on the decrees, the district court did not abuse its discretion in denying the workers' motion to intervene.

Affirmed.

Federal Civil Procedure 320

District court did not abuse its discretion in refusing to allow group of workers to intervene in employment discrimination suit against employers and union where

motion to intervene was filed nine months after union and employers reached consent agreement with Equal Employment Opportunity Commission and seven and one-half months after district court issued judgment on legality of consent agreement, workers knew of consent agreement three days after suit was filed and numerous other individuals and groups had moved to intervene before district court entered judgment on decrees. Fed.Rules Civ. Proc. rule 24(a)(1, 2), 28 U.S.C.A.

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Appeal from the United States District Court for the Northern District of Alabama.

Before WISDOM, GEE and FAY, Circuit Judges.

PER CURIAM:

This appeal considers the right of steelworkers to intervene in a Title VII employment discrimination action against their employers and union. Because the workers did not move to intervene in a timely fashion, we affirm the district court's denial of their motion.

The United States, on behalf of the Secretary of Labor and the Equal Employment Opportunity Commission, filed an action against nine of the major steel producers and the United Steelworkers of America under Section 707 of Title VII of the Civil Rights Act of 1964, as amended. The complaint alleged (1) that the companies and union had and were engaged in a pattern or practice of employment discrimination on the basis of race, color, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, and (2) that the companies had failed to comply with contractual obligations to the United States under Executive Order 11246, as amended, not to discriminate on the basis of race, color, sex, or national origin, and that the union had interfered with compliance by the companies with these contractual obligations and otherwise contributed to the companies' non-compliance.

On April 12, 1974, the same day the complaints were formally filed, two consent decrees were entered by the district court. The first concerned employment practices involving both the steel companies and the union, and the second concerned practices under the exclusive control of the companies. The first decree (Consent Decree I) is the only one in issue in the present proceeding.

The provisions of Consent Decree I are designed to correct the continuing effects of past discriminatory hiring, initial assignment, promotion, and transfer practices. Their adequacy and legality, as well as that of other provisions of Consent Decrees I and II, were previously challenged by three organizations, four individuals, and six groups of plaintiffs. The district court found those challenges to be without merit, and an appeal was taken to this Court where that decision was affirmed.[1]

A more complete history of this litigation is set forth in the Court's opinion in *United States v. Allegheny-Ludlum Industries*, 5 Cir. 1975, 517 F.2d 826, *cert. denied*, 1976, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187, and, for purposes of this appeal, need not be repeated. In *Allegheny Ludlum I* the Court decided, *inter alia*, that the consent decrees were lawful and that the district court correctly denied intervention to the National Organization for Women.

The appellants, applicants for intervention, are the United Steelworkers Justice Committee and fifty employees in the steel industry who allege that they "have been adversely affected by the implementation of Consent Decree I". The applicants seek, as did the appellants in *Allegheny Ludlum I*, to have Consent Decree I vacated and set aside.[2]

1. In order to avoid confusion with this appeal, the Court's decision found at 517 F.2d 826, and the proceedings leading up to that decision, are referred to herein as *Allegheny Ludlum I*.

2. The present applicants seek to void Consent Decree I because its implementation has allegedly affected their earnings and job

The application for intervention, along with a counterclaim for declaratory and injunctive relief, was filed on January 29, 1975. At the time of filing, the appeal in *Allegheny Ludlum I* was pending before this Court. Trial Judge Pointer ruled that until this Court decided the pending appeal he did not have jurisdiction to consider the merits of the motion to intervene. On August 18, 1975, in *Allegheny Ludlum I* this Court affirmed the lawfulness of the consent decrees and otherwise upheld the decision of the district court.

By order dated March 22, 1976, the district court denied the motion for intervention because neither the Committee nor the individual applicants were entitled to intervention as of right under either Rule 24(a)(1) or 24(a)(2) of the Federal Rules of Civil Procedure. The district court held that the motion for intervention was not timely. The motion was filed nine months after the union and the companies reached the consent agreement with the EEOC and seven and a half months after the district court issued a judgment on the legality of the agreement.

We reject the steelworkers' appeal principally on the basis of the decision of the district court and its careful procedural attempts not to prejudice any rights asserted by the applicants for intervention.

"Timeliness . . . is to be determined by the Court in the exercise of its sound discretion; unless that discretion is abused the Court's ruling will not be disturbed on review." *NAACP v. New York*, 1973, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648. *See also McDonald v. E. J. Lavino Co.*, 5 Cir. 1970, 430 F.2d 1065. Here the trial judge did not abuse his discretion. Post-judgment inter-

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opportunities adversely. The appellants in *Allegheny Ludlum I* sought to have the decree vacated because, in their opinion, it did not provide sufficient job opportunities and other relief to women and minorities.

vention is rare. The applicants offered no compelling reason for waiting until seven and a half months after the judgment and six months after implementation of the decrees to file their motion. Intervention now for the purpose of challenging the consent agreement will prejudice the appellees by jeopardizing months of negotiations, causing substantial litigation expenses, and even more substantial expenses of implementation. The applicants knew of the consent agreement three days after the suit was filed; numerous other individuals and groups moved to intervene before the district court entered a judgment on the decrees. To allow the applicants to intervene now would disrupt carefully considered proceedings.

Because the district court correctly denied the motion to intervene as untimely under Rule 24(a), we do not reach the additional grounds on which the district court based its decision. The judgment is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Tel 504—589-6514
600 Camp Street
New Orleans, La. 70130

August 26, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2717—U.S.A., ET AL. V. ALLEGHENY-LUDLUM INDUSTRIES, UNITED STEELWORKERS JUSTICE COMMITTEE, ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, *Clerk*

By BRENDA M. HAUCK
Deputy Clerk

** on behalf of appellants, United Steelworkers Justice Committee,

cc: Mr. Richard Kirschner
Ms. Miriam L. Gafni
Mr. Robert T. Moore
Mr. Richard S. Ugelow
Mr. John C. Falkenberry
Mr. Michael H. Gottesman
Mr. Jerome A. Cooper
Messrs. James R. Foreman, Jr.
W. K. Murray